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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 162

THE UNITED STATES OF AMERICA, APPELLANT

v.

GREGORIO CHAVEZ AND JOSE MARIA CHAVEZ

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court rendered no formal opinion. In its order sustaining a motion to quash the indictment and in an accompanying certificate by the presiding judge (R. 4–5), the court recited the grounds upon which it based its judgment dismissing the case for want of jurisdiction.

JURISDICTION

The judgment of the District Court was entered March 17, 1933 (R. 4). The petition for appeal

and the order allowing an appeal were filed April 14, 1933 (R. 5–6). The jurisdiction of this Court to entertain the appeal is invoked under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U.S.C., Title 18, Sec. 682), and Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (U.S.C., Title 28, Sec. 345).

In setting the case for argument this Court directed that "Further consideration of the question of jurisdiction of this Court in this case is postponed to the hearing of the case on the merits." We have, therefore, discussed the question of the jurisdiction of this Court at length at pages 9–18, *infra*.

QUESTION PRESENTED

The general question presented is whether the Federal Government or the State of New Mexico has jurisdiction of the offense of larceny when committed upon lands within the boundaries of an Indian pueblo grant in the State of New Mexico by a non-Indian, the property stolen being the property of a Pueblo Indian.

In our view of the case the determination of this question depends upon (1) whether the pueblo lands of New Mexico are "Indian country" within the meaning of Section 2145 of the Revised Statutes, which extends to the "Indian country" the general laws of the United States relating to the punishment of crimes committed in places within the exclusive jurisdiction of the United States, in-

cluding the crime of larceny (Section 287, Criminal Code), and (2) whether there is anything in the Enabling Act under which New Mexico was admitted into the Union which purports to operate as a surrender by the United States of its jurisdiction of the offense in question.

STATUTES INVOLVED

These are set out in the Appendix (pp. 39–42, *infra*).

STATEMENT

An indictment in six counts was returned against the appellees in the District Court of the United States for the District of New Mexico. (R. 1–3.) This indictment charged the theft by the appellees, who are non-Indians, of certain livestock belonging to Pueblo Indians, within the confines of the pueblo of Isleta in the State of New Mexico. The first count, which is typical of the remaining counts, reads as follows (R. 1):

> On or about the 3rd day of January, A.D. 1932, at and within the limits of the pueblo of Isleta, the same being Indian country, in the State and district of New Mexico and within the jurisdiction of this court, Gregorio Chavez and Jose Maria Chavez, who were then and there, each and both non-Indians and each and both late of said district, did unlawfully, willfully, knowingly, and feloniously steal, take, and carry away certain property, to wit: One (1) white mule branded " 4—8 " of the property of Antonio

Abeyta and of the value of thirty and no/100 ($30.00) dollars; the said Antonio Abeyta being then and there an Indian of the pueblo of Isleta, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

A motion to quash this indictment was filed by the appellees upon the following grounds (R. 3–4):

1. That in neither of the six counts of said indictment nor in any of them is it alleged that the defendants herein are Indians or that the crimes and offenses alleged were committed within the exclusive jurisdiction of the United States.

2. That in the six counts of the said indictment, and in each of them, it is alleged that the offenses were committed within the limits of the pueblo of Isleta, the same being Indian country, whereas, in truth and in law, no part of the pueblo of Isleta nor the lands thereof are Indian country.

3. That the United States District Court for the District of New Mexico has no jurisdiction to try a non-Indian for any offense committed within the jurisdiction of the State of New Mexico.

4. That the pueblo of Isleta lies within the exterior boundary of the State of New Mexico, and that the State of New Mexico has never relinquished its criminal jurisdiction over said lands, and that the United States District Court for the District of New Mexico has no jurisdiction to try a non-

Indian for any offense committed within or upon the pueblo of Isleta.

5. That the relationship between the United States of America and the Pueblo Indians, being that of guardian and ward, confers no extra-constitutional powers or status upon the Federal Government, by which it may enforce its criminal laws upon the citizens of the State of New Mexico.

The District Court sustained this motion to quash, which it called a demurrer, and dismissed the case for want of jurisdiction. Its judgment contains a recital that it was based (R. 4–5)—

> on the ground that the facts pleaded show that this court has no jurisdiction in said cause for the reason that the facts pleaded do not constitute a violation of any statute of the United States, and for the further reason that under the Enabling Act of Congress for the State of New Mexico, the lands within the Isleta pueblo grant do not constitute Indian country within the contemplation of R.S., sec. 2145, title 25, sec. 217, U.S.C.A.

In a certificate accompanying the judgment the presiding judge stated (R. 5):

> It is hereby certified that the order and judgment in the above-entitled case made and entered sustaining the demurrer to the indictment and dismissing said cause was based entirely upon the construction by the court of the enabling act for New Mexico (H.R. 18166) as applicable to R.S. Sec. 2145,

> title 25, sec. 217, U.S.C.A., and not on any defect in the indictment itself, it being the opinion of the court that under the enabling act, the constitution of the State of New Mexico and the statutes of the United States applicable thereto, the matters and facts pleaded in said indictment, under the construction of said statutes as adopted by this court, do not constitute a violation of any Federal statute for the reason that this court has no jurisdiction over the criminal offense of larceny when committed upon lands within the boundaries of the Isleta pueblo grant in the State of New Mexico by a non-Indian, the personal property stolen being property of an Indian, the jurisdiction to try said offense being vested exclusively in the State court of the State of New Mexico.

A direct appeal to this Court was then applied for and allowed. (R. 5–6.)[1]

SPECIFICATION OF ERRORS TO BE URGED

The United States relies upon the following errors assigned below (R. 6):

1. The District Court erred in sustaining the demurrer or motion to quash.

2. The District Court erred in holding that it was without jurisdiction in the said cause.

---

[1] In *United States* v. *Molena and Saiz*, No. 161 on the docket of this Court, the parties have stipulated that this Court shall enter the same judgment that it enters in the instant case.

3. The District Court erred in holding that the facts pleaded do not constitute a violation of any statute of the United States.

4. The District Court erred in holding that, under the Enabling Act of Congress for the State of New Mexico (36 Stat. 557), the lands within the Isleta pueblo grant in the State of New Mexico do not constitute Indian country within the contemplation of Section 2145, Revised Statutes, U.S.C., Title 25, Sec. 217.

5. The District Court erred in holding that it had no jurisdiction to try the defendants for the larceny of personal property of Pueblo Indians committed within an Indian pueblo, the defendants themselves being non-Indians.

SUMMARY OF ARGUMENT

(1) This Court has jurisdiction of the instant appeal under the Criminal Appeals Act. In sustaining the motion to quash the indictment in this case the court below based its decision upon the construction of a statute upon which the indictment was founded. Also, as the court below "had not commenced its sitting for the trial" when it rendered its decision and as the effect of that decision was forever to bar the United States from prosecuting the offenses charged, the decision constituted, in effect, a "decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

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(2) In view of the decisions of this Court in *United States* v. *Sandoval*, 231 U.S. 28, and *United States* v. *Candelaria*, 271 U.S. 432, there would seem to be no room for doubt that the Pueblo lands in New Mexico are "Indian country" within the meaning of Section 2145 R.S. which, with certain exceptions not here material, extends to the "Indian country" the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia. One of such laws is Section 287 of the Criminal Code, defining and punishing the crime of larceny when committed in a place within the exclusive jurisdiction of the United States. Under Section 256 of the Judicial Code the courts of the United States have jurisdiction exclusive of the courts of the several States "of all crimes and offenses cognizable under the authority of the United States."

(3) The jurisdiction of the United States to punish the crime of larceny when committed within the limits of an Indian pueblo in New Mexico by a non-Indian, the property stolen being that of a Pueblo Indian, was not affected by the admission of New Mexico into the Union on an equal footing with the other States.

ARGUMENT

I

THIS COURT HAS JURISDICTION OF THIS APPEAL

The Criminal Appeals Act (Act of March 2, 1907, c. 2564, 34 Stat. 1246; U.S.C., Title 18, Sec. 682), contains the following provisions:

> That a writ of error [2] may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.
>
> * * * * *
>
> From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.
>
> The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.
>
> * * * *Provided,* That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant.

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[2] Review under this Act is now had by appeal instead of on writ of error by virtue of the Act of January 31, 1928, c. 14, 45 Stat. 54, as amended by the Act of April 26, 1928, c. 440, 45 Stat. 466 (U.S.C. Sup. VI, Title 28, Sec. 861 (a) and (b)).

Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c 229, 43 Stat. 936, 938 (U.S.C., Title 28, Sec. 345), provides:

> A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:
>
> * * * * *
>
> "(2) The Act of March 2, 1907, 'providing for writs of error in certain instances in criminal cases' where the decision of the district court is adverse to the United States."
>
> * * * * *

There can be no question that the appeal in this case was taken in time. The judgment of the District Court was entered March 17, 1933 (R. 4), and the petition for appeal and the order allowing the appeal were filed April 14, 1933 (R. 5–6). The period elapsing between the date of the judgment and the taking of appeal was consequently 28 days, whereas 30 days are allowed under the Criminal Appeals Act.

With reference to the proviso in that Act, it is obvious from the record that no verdict has been rendered in favor of the defendants.

The only question which can seriously arise is whether the judgment entered below is of the character which, under the Act, may be reviewed by this Court. We think the jurisdiction of this Court is clear because (1) the decision below sus-

taining the motion to quash or, as it was called by the District Court, a demurrer, was necessarily based upon the construction of a statute upon which the indictment was founded, and (2) because that decision sustained what was, in effect, "a special plea in bar, when the defendant has not been put in jeopardy."

A. The decision below was based upon the construction of a statute upon which the indictment was founded

We recognize, of course, that this Court is without jurisdiction under the Criminal Appeals Act where the decision below is based merely upon the insufficiency of the indictment as a pleading (*United States* v. *Carter*, 231 U.S. 492; *United States* v. *Stevenson*, 215 U.S. 190, 195–196), but that is not the situation in this case, because the presiding judge below specifically stated in his certificate accompanying the judgment that the judgment was not based "on any defect in the indictment itself." (R. 5.) According to the judgment of the court (R. 4) its decision sustaining the motion to quash, which it called a demurrer[a] was sustained "on the ground that the facts pleaded show that this court has no jurisdiction in said cause for the reason that the facts pleaded do not constitute a violation of any statute of the United States, and

[a] It is immaterial whether the defendants' motion is denominated a motion to quash or a demurrer. The jurisdiction of this Court under the Criminal Appeals Act applies in either case. See *United States* v. *Heinze, No. 2*, 218 U.S. 547, 550–551.

for the further reason that under the Enabling Act of Congress for the State of New Mexico, the lands within the Isleta pueblo grant do not constitute Indian country within the contemplation of R.S., sec. 2145, title 25, sec. 217, U.S.C.A." In his certificate accompanying the judgment the presiding judge gave a more elaborate statement of the grounds of his decision. He said that the order and judgment (R. 5)—

> was based entirely upon the construction by the court of the enabling act for New Mexico (H.R. 18166) as applicable to R.S. Sec. 2145, title 25, sec. 217, U.S.C.A., * * * it being the opinion of the court that under the enabling act, the constitution of the State of New Mexico and the statutes of the United States applicable thereto, the matters and facts pleaded in said indictment, under the construction of said statutes as adopted by this court, do not constitute a violation of any Federal statute for the reason that this court has no jurisdiction over the criminal offense of larceny when committed upon lands within the boundaries of the Isleta pueblo grant in the State of New Mexico by a non-Indian, the personal property stolen being property of an Indian, the jurisdiction to try said offense being vested exclusively in the State Court of the State of New Mexico.

Undoubtedly happier language could have been employed to convey the idea that the judgment was based upon the construction of the statute or

statutes upon which the indictment was founded, but we think that when those statutes are examined there can be no question that the decision below was necessarily and fundamentally based upon their construction.[4] The crime charged in the instant indictment was the larceny of personal property belonging to a Pueblo Indian committed by a non-Indian upon lands contained within an Indian pueblo within the State of New Mexico. The indictment was obviously based upon the following statutes: Section 2145, R.S., which, with certain exceptions not here material, extends to the "Indian country" the general laws of the United States as to the punishment of crimes committed in places within the exclusive jurisdiction of the United States, except the District of Columbia (*infra*, p. 39); Section 272 of the Criminal Code, which forms a part of Chapter Eleven of the Criminal Code and which provides that "the crimes and offenses defined in this chapter shall be punished as herein prescribed" when committed within certain places under the exclusive jurisdiction of the United States (*infra*, p. 40), and Section 287 of the Criminal Code, which is one of the sections in

[4] Of course, the very purpose of the practice of including in the record a certificate by the District Judge where no opinion has been rendered in connection with the judgment is to show that the judgment was based upon the invalidity or construction of the statute upon which the indictment was founded and that the case is consequently one appealable under the Criminal Appeals Act.

Chapter Eleven and which provides for the punishment of larceny (*infra*, pp. 39–40).

Sections 272 and 287 of the Criminal Code may be eliminated from consideration because no question was presented as to their construction. The indictment was not held to be defective because it did not state an offense under those provisions. The proposition decided was that these sections did not apply because the term "Indian country" as employed in Section 2145 R.S., the statute which brought into operation Sections 272 and 287 of the Criminal Code, did not embrace lands situated within an Indian pueblo grant in New Mexico. While this decision was in some way, which the record does not reveal, influenced by the court's interpretation of the Enabling Act for New Mexico and the constitution of that State, there is, we submit, no escape from the conclusion that the court could not have rendered the decision it did without construing the term "Indian country" as used in Section 2145 R.S. In other words, "The court could not have decided, as it did, that the acts charged are not within the condemnation of the statute without first ascertaining what it does condemn, which, of course, involved its construction. Indeed, it seems a solecism to say that the decision that the acts charged are not within the statute is not based upon a construction of it." (*United States* v. *Patten*, 226 U.S. 525, 535.

The fact that the consideration of other statutes is involved in determining the proper construction

to be accorded language contained in the statute upon which the indictment is immediately founded does not, of course, defeat the jurisdiction of this Court. See *United States* v. *Keitel*, 211 U.S. 370, 384–385; *United States* v. *Biggs*, 211 U.S. 507, 518; *United States* v. *Foster*, 233 U.S. 515, 523.

We see no fundamental difference between this case and the case of *United States* v. *Ramsey*, 271 U.S. 467, in which this Court took jurisdiction under the Criminal Appeals Act. In that case the Court said (p. 468):

> The defendants in error, two white men, were charged, by an indictment returned in the court below, with the murder of one Henry Roan, a fullblood Osage Indian and a legal member of the Osage Tribe, committed "in Osage County, in said district, in the Indian country and in and upon the reservation theretofore and then established by law of the United States for the Osage Tribe of Indians, on and in a certain tract of land therein which was then and there under the exclusive jurisdiction of the United States and comprised a restricted surplus allotment, theretofore made under and according to the act of Congress approved June 28, 1906, . . . the title to which said allotment . . . was held in trust by the United States and was inalienable" by the allottee, who had never had issued to her a certificate of competency authorizing her to sell the allotment. The indictment is drawn under § 2145 R.S., which extends the

> general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, to the Indian country, with certain exceptions not material here. The court below sustained a demurrer to this indictment upon the ground that the allotment described in the indictment as the *locus* of the crime was not Indian country within the meaning of § 2145. Thereupon, the construction of the statute upon which the indictment is drawn being involved, the case was brought here on writ of error under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246.

It is obvious that in the *Ramsey* case the same general set-up of statutes was involved as in the instant case, Section 2145 R.S., extending the general laws of the United States with reference to the punishment of crimes committed in places within the exclusive jurisdiction of the United States to the Indian country; Section 272 of the Criminal Code, providing that the crimes defined in the chapter in which that section is located should be punished as therein prescribed when committed in places within the exclusive jurisdiction of the United States; and the sections of that chapter defining and punishing murder (Sections 273, 275), corresponding to the like section in the chapter defining and punishing larceny.

See also *United States* v. *Pelican*, 232 U.S. 442, 444–445; *United States* v. *Wright*, 229 U.S. 226, 228.

B. The order below is, in effect, a "decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy".

Under the fourth paragraph of the Criminal Appeals Act this Court has jurisdiction to review "a decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." In *United States* v. *Murdock*, 284 U.S. 141, 147, this Court said:

> Its [the judgment's] effect, unless reversed, is to bar further prosecution for the offense charged. It follows unquestionably that, without regard to the particular designation or form of the plea or its propriety, this court has jurisdiction under the Criminal Appeals Act. *United States* v. *Barber*, 219 U.S. 72, 78. *United States* v. *Oppenheimer*, 242 U.S. 85. *United States* v. *Thompson*, 251 U.S. 407, 412. *United States* v. *Storrs*, 272 U.S. 652, 655. *United States* v. *Goldman*, 277 U.S. 229, 236.

In the instant case the court held that it was without jurisdiction as a Federal court of the offense charged. The necessary effect of this decision was forever to bar prosecution of the offense by the United States. The plea sustained, although not denominated as such, was, in effect, a special plea in bar based on facts appearing on the face of the indictment. (Cf. *United States* v. *Goldman*, 277 U.S. 229, 236–237.) It was essentially a plea to the jurisdiction of the District Court as a Federal court. Decisions sustaining similar pleas were reviewed

by this Court under the Criminal Appeals Act in *United States* v. *Unzeuta*, 281 U.S. 138, 141, and *United States* v. *Celestine*, 215 U.S. 278.

In the latter case this Court expressly pointed out (p. 283) that the paragraph of the Criminal Appeals Act under consideration "differs from the two preceding, in that the review authorized by them is limited to cases in which 'the decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded,' while no such limitation appears in this paragraph. The full significance of this difference need not now be determined, but clearly the fourth paragraph gives to this court a right to review the precise question decided by a trial court in sustaining a special plea in bar, although that decision may involve the application rather than the invalidity or construction, strictly speaking, of the statute upon which the indictment was founded." See also *United States* v. *Oppenheimer*, 242 U.S. 85, 86.

The fair inference from the record in this case is that the defendants had not been placed in jeopardy when the decision of the court below was entered, as the court "had not commenced its sitting for the trial." Cf. *United States* v. *Goldman*, 277 U.S. 229, 237, *supra*.

II

THE PUEBLO LANDS IN NEW MEXICO ARE "INDIAN COUNTRY"

Section 2145 R.S. provides that, with certain exceptions not here material, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the "Indian country." One of such laws is Section 287 of the Criminal Code, defining and punishing the crime of larceny when committed at a place within the exclusive jurisdiction of the United States. Section 256 of the Judicial Code (U.S.C., Title 28, Sec. 371) provides that the courts of the United States shall have jurisdiction exclusive of the courts of the several States "of all crimes and offenses cognizable under the authority of the United States."

The indictment in the instant case is based upon Section 287 of the Criminal Code and alleges that the offenses charged were committed "at and within the limits of the pueblo of Isleta, the same being Indian country, in the State and District of New Mexico, and within the jurisdiction of this court." (R. 1.) If the lands contained in the pueblo of Isleta are "Indian country", there would seem to be no question that the United States and not the State of New Mexico has jurisdiction to punish the offenses charged, unless the United States surrendered that right under the Act pursuant to which

New Mexico was admitted into the Union. This latter question is discussed at pp. 35–38, *infra*.

Section 2145 R.S. had its origin in Section 25 of the Act of June 13, 1834, c. 161, 4 Stat. 729, 733, known as "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." This Act provided in Section 1—

> That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.[8]

In *Clairmont* v. *United States*, 225 U.S. 551, this Court said (pp. 557–558):

> This portion of the act of 1834 was not re-enacted in the Revised Statutes, though other parts of the statute were, and hence was repealed by § 5596 of the revision. But, as has frequently been stated by this court, the definition may still "be referred to in connection with the provisions of its original context which remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time

[8] The Act of 1834 was extended over the Indian tribes in New Mexico by Section 7 of the Act of February 27, 1851, c. 14, 9 Stat. 574, 587. See *United States* v. *Candelaria*, 271 U.S. 432, 441.

what must be regarded as Indian country where it is spoken of in the statutes." *Ex parte Crow Dog*, 109 U.S. 556, 561; *United States* v. *LeBris*, 121 U.S. 278, 280.

The proper criterion to be applied was considered in *Bates* v. *Clark*, 95 U.S. 204, where Mr. Justice Miller, delivering the opinion of the court, said (*id.*, pp. 207, 208):

"Notwithstanding the immense changes which have since taken place in the vast region covered by the act of 1834, by the extinguishment of Indian titles, the creation of States and the formation of territorial governments, Congress has not thought it necessary to make any new definition of Indian country. Yet during all this time a large body of laws has been in existence, whose operation was confined to the Indian country, whatever that may be. * * *

"The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case."

See also *United States* v. *Celestine*, 215 U.S. 278, 285.

If this definition be applied to the instant case, we think the decisions of this Court disclose without question that the pueblo lands in New Mexico are "Indian country."

In *United States* v. *Sandoval*, 231 U.S. 28, the indictment involved was founded upon the Act of January 30, 1897, c. 109, 29 Stat. 506, as supplemented by Section 2 of the New Mexico Enabling Act of June 20, 1910, c. 310, 36 Stat. 557. The first Act makes it a punishable offense to introduce intoxicating liquor into the Indian country, and the second, in naming the conditions upon which New Mexico should be admitted into the Union, prescribed, to use the language of this Court, "in substance, that the lands then owned or occupied by the Pueblo Indians should be deemed and treated as Indian country within the meaning of the first act and of kindred legislation by Congress." (See Section 2 of the New Mexico Enabling Act, p. 41, *infra*.) A demurrer was interposed to this indictment and the indictment was dismissed on the ground that the statute upon which it was founded was invalid as applied to Indian pueblos in New Mexico because it usurped a part of the police power of the State and encroached upon its equal footing with the other States.

After stating that (p. 38)—

> Whether without this legislative interpretation the first act would have included the pueblo lands we need not consider. The Territorial Supreme Court had but recently

> hold that it did not include them (*United States* v. *Marcus*, 14 New Mex. 1), and Congress, evidently wishing to make sure of a different result in the future, expressly declared that it should include them * * *

this Court said that the question before it was (p. 38)

> whether the status of the Pueblo Indians and their lands is such that Congress competently can prohibit the introduction of intoxicating liquor into those lands notwithstanding the admission of New Mexico to statehood.

In other words, as we interpret this language, the Court was called upon to determine whether the Pueblo Indians were, in fact, Indian communities within the usual meaning of that term and whether the lands which they occupied were, in fact, Indian lands. That this is so is evident from the following quotations, which appear later in the opinion (pp. 45–47):

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State. * * *

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts. *United States* v. *Holliday*, 3 Wall. 407, 419; *United States* v. *Rickert*, 188 U.S. 432, 443, 445; *Matter of Heff*, 197 U.S. 488, 499; *Tiger* v. *Western Investment Co., supra.*

After a most exhaustive consideration of the status of the Pueblo Indians, this Court said (p. 47):

> As before indicated, by an uniform course of action beginning as early as 1854 and continued up to the present time [October, 1913], the legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and, considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling. * * *

The Court then considered the contention that the legislation could not be made to embrace the Pueb-

los because they are citizens. The Court said, however, that (p. 48)—

> As before stated, whether they are citizens is an open question, and we need not determine it now, because citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people. *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 308; *United States* v. *Rickert*, 188 U.S. 432, 445; *United States* v. *Celestine*, 215 U.S. 278, 290; *Hallowell* v. *United States*, *supra*.

The Court then dealt specifically with the title under which the Pueblos hold their land. It said (p. 48):

> It also is said that such legislation cannot be made to include the lands of the Pueblos, because the Indians have a fee simple title. It is true that the Indians of each pueblo do have such a title to all the lands connected therewith, excepting such as are occupied under executive orders, but it is a communal title, no individual owning any separate tract. In other words, the lands are public lands of the pueblo, and so the situation is essentially the same as it was with the Five Civilized Tribes, whose lands, although owned in fee under patents from the United States, were adjudged subject to the legislation of Congress enacted in the exercise of the Government's guardianship over those tribes and their affairs. *Stephens* v. *Chero-*

kee Nation, 174 U.S. 445, 488; *Cherokee Nation* v. *Hitchcock, supra; Heckman* v. *United States*, 224 U.S. 413; *Gritts* v. *Fisher, id.* 640; *United States* v. *Wright, supra* [229 U.S. 226]. * * * *

With respect to one of its earlier decisions concerning the Pueblos of New Mexico, the Court said (pp. 48–49):

> We are not unmindful that in *United States* v. *Joseph*, 94 U.S. 614, there are some observations not in accord with what is here said of these Indians, but as that case did not turn upon the power of Congress over them or their property, but upon the interpretation and purpose of a statute not nearly so comprehensive as the legislation now before us, and as the observations there made respecting the Pueblos were evidently based upon statements in the opinion of the territorial court, then under review, which are at variance with other recognized sources of information, now available, and with the long-continued action of the legislative and executive departments, that case cannot be regarded as holding that these Indians or their lands are beyond the range of Congressional power under the Constitution.

We think this decision is a clear holding that the lands of the Pueblos in New Mexico may be characterized as "Indian country" because they are such in fact. This conclusion is fortified by the later decision of this Court in *United States* v. *Candelaria*, 271 U.S. 432, decided June 1, 1926. In that

case the United States brought suit to quiet in the pueblo of Laguna in New Mexico the title to certain lands on that State alleged to belong to the pueblo. One of the questions of law certified by the Circuit Court of Appeals to this Court was (p. 438):

> 1. Are Pueblo Indians in New Mexico in such status of tutelage as to their lands in that State that the United States, as such guardian, is not barred either by a judgment in a suit involving title to such lands begun in the territorial court and passing to judgment after statehood or by a judgment in a similar action in the United States District Court for the District of New Mexico, where, in each of said actions, the United States was not a party nor was the attorney representing such Indians therein authorized so to do by the United States?

In answering this question this Court again made an extensive examination into the status of the Pueblo Indians and their lands. Referring to its prior decision in the *Sandoval* case, this Court said (p. 440):

> While we recognized in that case that the Indians of each pueblo, collectively as a community, have a fee simple title to the lands of the pueblo (other than such as are occupied under executive orders), we held that their lands, like the tribal lands of other Indians owned in fee under patents from the United States, are "subject to the legislation

> of Congress enacted in the exercise of the Government's guardianship" over Indian tribes and their property.

The Court then referred to various considerations which had intervened since its decision in the *Joseph* case, referred to in the *Sandoval* case, *supra*, which made it certain that it was the purpose of Congress to subject the Pueblo Indians and their lands to the legislation enacted by Congress in the exercise of the Government's guardianship over Indian tribes and their property. Among other things the Court referred to a Congressional enactment annulling a decision of a territorial court in New Mexico holding that Pueblo lands were taxable, and also to the provisions of the New Mexico Enabling Act, discussed in the *Sandoval* case, which annulled the decision of the territorial court construing the statute prohibiting the sale of liquor to Indians and its introduction into the Indian country as not including the Pueblo Indians or their lands.

The Court then stated that many provisions have been enacted by Congress to prevent the Government's Indian wards from improvidently disposing of their lands and becoming homeless public charges, and that (p. 441):

> One of these provisions, now embodied in section 2116 of the Revised Statutes, declares: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto from any Indian nation or tribe of In-

dians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." This provision was originally adopted in 1834, c. 161, sec. 12, 4 Stat. 730, and, with others "regulating trade and intercourse with the Indian tribes," was extended over "the Indian tribes" of New Mexico in 1851, c. 14, sec. 7, 9 Stat. 587.

The Court then said (pp. 441–442):

> While there is no express reference in the provision to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, "any tribe of Indians." Although sedentary, industrious and disposed to peace, they are Indians in race, customs and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races. It therefore is difficult to believe that Congress in 1851 was not intending to protect them, but only the nomadic and savage Indians then living in New Mexico. A more reasonable view is that the term "Indian tribe" was used in the acts of 1834 and 1851 in the sense of "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya* v. *United States,* 180 U.S. 261, 266. In that

sense the term easily includes Pueblo Indians.

Under the Spanish law Pueblo Indians, although having full title to their lands, were regarded as in a state of tutelage and could alienate their lands only under governmental supervision. See *Chouteau* v. *Molony,* 16 How. 203, 237. Text writers have differed about the situation under the Mexican law; but in *United States* v. *Pico,* 5 Wall. 536, 540, this Court, speaking through Mr. Justice Field, who was specially informed on the subject, expressly recognized that under the laws of Mexico the government "extended a special guardianship" over Indian pueblos and that a conveyance of pueblo lands to be effective must be "under the supervision and with the approval" of designated authorities. And this was the ruling in *Sunol* v. *Hepburn,* 1 Cal. 254, 273, *et seq.* Thus it appears that Congress in imposing a restriction on the alienation of these lands, as we think it did, was but continuing a policy which prior governments had deemed essential to the protection of such Indians.

After its review of the pertinent factors, the court stated that its answer to the question propounded was that the suit of the United States on behalf of the pueblo was not barred by reason of the adverse decrees against the pueblo rendered in the suits which the Government had not authorized, for the reason that (pp. 443–444)—

> The Indians of the pueblo are wards of the United States[6] and hold their lands subject to the restriction that the same cannot be alienated in anywise without its consent. A judgment or decree which operates directly or indirectly to transfer the lands from the Indians, where the United States has not authorized or appeared in the suit, infringes that restriction. The United States has an interest in maintaining and enforcing the restriction which cannot be affected by such a judgment or decree. * * *

See also *Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 315, holding that the Pueblo Indians are subject to certain other legislation applicable to Indians generally.

So far as we have been able to find, there has been no legislation since these decisions affecting the status of the Pueblo Indians or their lands.

It is obvious from the above decisions that each of the pueblos in New Mexico still retains the title to its lands and that, so far as the present question is concerned, this title differs in no material respect

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[6] In Section 1 of the Act of June 7, 1924, c. 331, 43 Stat. 636, Congress expressly provided: "That in order to quiet title to various lots, parcels, and tracts of land in the State of New Mexico for which claim shall be made by or on behalf of the Pueblo Indians of said State as hereinafter provided, the *United States of America, in its sovereign capacity as guardian of said Pueblo Indians* shall, by its Attorney General, file in the District Court of the United States for the District of New Mexico, its bill or bills of complaint with a prayer for discovery of the nature of any claim or claims of any kind whatsoever adverse to the claim of said Pueblo Indians, as hereinafter determined." (Italics ours.)

from the customary Indian title. The Indian title never having been extinguished, the pueblo lands are, we submit, "Indian country" within the rule announced in the *Clairmont* case, *supra*, and the decisions cited therein.

While the court below stated in its judgment (R. 4–5) that "under the Enabling Act of Congress for the State of New Mexico, the lands within the Isleta pueblo grant do not constitute Indian country within the contemplation of R.S., sec. 2145", it did not make any reference to the specific provision of the Enabling Act upon which it relies. The files of this Department indicate, however, that the District Judge, in announcing his decision, stated orally that the *Sandoval* case was not controlling because all that this Court there decided was that the Pueblo lands were "Indian country" within the contemplation of the statute prohibiting liquor traffic with the Indians. In so holding, the District Judge undoubtedly had reference to the provision of Section 2 of the Enabling Act for New Mexico, which directed that the convention assembled to form a state constitution should provide by an ordinance irrevocable without the consent of the United States and the people of the State, that the sale, barter, or giving of intoxicating liquors to Indians and the introduction of liquor into the Indian country, "which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico", are forever prohibited. Of course, in view of this provision in the Enabling Act, there could be no question that the Pueblo

lands were "Indian country" within the meaning of the liquor statute, but as we have heretofore pointed out (*supra*, p. 25) this Court was required to decide the broader question whether Congress could lawfully bring within the scope of the statute a body or community of people which it was contended was not an Indian community and lands which it was also contended were not "Indian country." This Court answered these contentions by holding that Congress had the power in question, because the Pueblos of New Mexico were dependent Indian communities entitled to the aid and protection of Congress, like other Indian tribes, and because their lands were in fact "Indian country", they being held under a communal title and not being individually owned.

In its opinion in the *Sandoval* case this Court said that the provision in the Enabling Act that the term "Indian country" shall "include all lands now owned or occupied by the Pueblo Indians of New Mexico" applied not only to the liquor statute but also to "kindred legislation by Congress" (231 U.S. 37), but even if it be assumed that the provision in question applies to the liquor statute alone, it is evident, as this Court pointed out in the *Sandoval* opinion (p. 38), that the primary purpose of its insertion in the Enabling Act was to prevent any holding in the future, such as the territorial court had made before the Act was passed, that the liquor statute did not apply to the Pueblo

Indians or their lands. (See *United States* v. *Mares,* 14 N.M. 1.) It would, we submit, be entirely contrary to the manifest purpose of the provision to suppose that Congress intended thereby to remove the Pueblo lands from the operation of the vast body of other legislation applicable to the Indian country.

We think the decision of this case may be rested upon the ground that the Pueblo lands are "Indian country" because the Indian title has never been extinguished, but we wish to point out that the decisions of this Court indicate that it will not give a narrow meaning to the term "Indian country" when used in legislation designed for the protection of the Indians and their property. In *Donnelly* v. *United States,* 228 U.S. 243, this Court said (p. 269):

> With reference to country that was formerly subject to the Indian occupancy, the cases cited [*Ex parte Crow Dog,* 109 U.S. 556, 561; *United States* v. *LeBris,* 121 U.S. 278, 280; *Clairmont* v. *United States,* 225 U.S. 551, 557] furnish a criterion for determining what is "Indian country." But "the changes which have taken place in our situation" are so numerous and so material, that the term cannot now be confined to land formerly held by the Indians, and to which their title remains unextinguished.

It therefore held (p. 269) that "nothing can more appropriately be deemed 'Indian country,' within the meaning of those provisions of the Revised

Statutes that relate to the regulation of the Indians and the government of the Indian country, than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation." The term "Indian country" was also given the same broad construction in the cases of *United States* v. *Pelican*, 232 U.S. 442, and *United States* v. *Ramsey*, 271 U.S. 467. In the former case the Court held that the term included lands which had been allotted in severalty to an Indian but which were held in trust by the United States for a period of 25 years, during which time they were inalienable. In the latter case the Court held that the term also included lands which had been conveyed to an Indian in fee under a "restricted" as distinguished from a "trust" allotment.

III

THE ADMISSION OF NEW MEXICO INTO THE UNION ON AN EQUAL FOOTING WITH THE OTHER STATES DID NOT DEPRIVE THE UNITED STATES OF JURISDICTION TO PUNISH THE OFFENSES CHARGED

The indictment in this case alleges that the property stolen was the property of Pueblo Indians and that those who stole it were non-Indians. If the *locus* of the crimes charged was "Indian country" within the meaning of Section 2145 R.S., there can be no question as to the jurisdiction of the United States to punish these crimes, even though the offenders were non-Indians, unless the enactment

subsequent to Section 2145 R.S. of the New Mexico Enabling Act of 1910 deprived it of such jurisdiction because of the provision contained therein that the admission of New Mexico into the Union should be "on an equal footing with the other States." That this provision of the Enabling Act did not deprive the United States of jurisdiction is evident from the decision of this Court in *Donnelly* v. *United States,* 228 U.S. 243, where the Court, in referring to a similar provision in the Enabling Act for California, said (pp. 269, 271–272):

> Is the killing of an Indian by a person not of Indian blood, when committeed upon an Indian reservation within the limits of a State, cognizable in the Federal Courts?
>
> * * * * *
>
> Section 2145, Rev. Stat., in connection with § 5339, plainly includes within its terms the offense of murder committed against the person of an Indian within an Indian reservation by a person not of Indian blood, but it is contended that the admission of California into the Union "on an equal footing with the original States," without any express reservation by Congress of governmental jurisdiction over the public lands contained within her borders, conferred upon the State undivided authority to punish crimes committed upon those lands, even when set apart for an Indian reservation, excepting crimes committed by the Indians. Reference is made to the cases of

United States v. *McBratney*, 104 U.S. 621, and *Draper v. United States*, 164 U.S. 240, where it was held, in effect, that the organization and admission of States qualified the former Federal jurisdiction over Indian country included therein by withdrawing from the United States and conferring upon the States the control of offenses committed by white people against whites, in the absence of some law or treaty to the contrary. In both cases, however, the question was reserved as to the effect of the admission of the State into the Union upon the Federal jurisdiction over crimes committeed by or against the Indians themselves (104 U.S. 624; 164 U.S. 247). Upon full consideration we are satisfied that offenses committeed by or against Indians are not within the principle of the *McBratney* and *Draper Cases*. This was in effect held, as to crimes committed *by* the Indians, in the *Kagama Case*, 118 U.S. 375, 383, where the constitutionality of the second branch of § 9 of the act of March 3, 1885, 23 Stat. 385, was sustained upon the ground that the Indian tribes are the wards of the nation. This same reason applies—perhaps *a fortiori*—with respect to crimes committeed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood.

The result is that, in our opinion, the offense with which the plaintiff in error was

charged was punishable in the Federal courts under §§ 2145 and 5339, Rev. Stat.

See also *United States* v. *Pelican*, 232 U.S. 442, 445; *United States* v. *Ramsey*, 271 U.S. 467, 469; *United States* v. *Sandoval*, 231 U.S. 28, 49; *United States* v. *Ewing*, 47 Fed. 809 (S.D.); *United States* v. *Bridleman*, 7 Fed. 894 (Ore.).

So far as we have been able to discover there is no provision in the New Mexico Enabling Act which may be construed as constituting a relinquishment by the Federal Government of its jurisdiction of offenses against the laws of the United States when committed on Pueblo lands by non-Indians against Indians or their property.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment below should be reversed, with directions to the District Court to overrule the demurrer and to proceed to trial.

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APPENDIX

Statutes Involved

Section 2145 R.S. (U.S.C., Title 25, Sec. 217) provides as follows:

> Except as to crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

Section 2145 is a part of Title xxviii of the Revised Statutes, which bears the heading "Indians." The indictment does not purport to charge a crime covered by any of the sections contained in that title, but was based upon Section 287 of the Criminal Code (U.S.C., Title 18, Sec. 466),[1] which, so far as pertinent, reads as follows:

> Whoever shall take and carry away, with intent to steal or purloin, any personal property of another, shall be punished as follows: If the property taken is of a value exceeding fifty dollars, or is taken from the person of another, by a fine of not more than ten thou-

[1] Section 287 of the Criminal Code was formerly Section 5356 of the Revised Statutes and constituted a part of Title lxx, "Crimes." It was contained in chapter three entitled "Crimes arising within the maritime and territorial jurisdiction of the United States."

> sand dollars, or imprisonment for not more than ten years, or both; in all other cases, by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or both. * * *

This section is found in Chapter Eleven of the Criminal Code, entitled "Offenses within the admiralty and maritime and the territorial jurisdiction of the United States." The first section of this chapter, Section 272 of the Criminal Code (U.S.C., Title 18, Sec. 451),[2] provides:

> The crimes and offenses defined in this chapter shall be punished as herein prescribed:
>
> * * * * *
>
> Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

The Enabling Act of June 20, 1910, c. 310, 36 Stat. 557, 558–560, 561, under which New Mexico was admitted into the Union, contains the following provisions:

> SEC. 2. That * * * the said convention shall be, and is hereby, authorized to form a constitution and provide for a state

[2] Section 272 of the Criminal Code was not contained in the Revised Statutes. It was inserted in the Criminal Code to avoid, as in the Revised Statutes, a reference to the locus of the offense in each of the sections of the chapter relating to offenses arising within the admiralty and maritime and the territorial jurisdiction of the United States.

government for said proposed State, all in the manner and under the conditions contained in this Act. * * *

And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said State—

First. That * * * the sale, barter, or giving of intoxicating liquors to Indians and the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico, are forever prohibited.

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title * * * to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; * * * but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.

* * * * *

Eighth. That whenever hereafter any of the lands contained within Indian reservations or allotments in said proposed State shall be allotted, sold, reserved, or otherwise disposed of, they shall be subject for a period of twenty-five years after such allotment, sale, reservation, or other disposal to all the laws of the United States prohibiting the introduction of liquor into the Indian country; and the terms "Indian" and "Indian country" shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them.

* * * * *

SEC. 5. * * * When said election of said state and county officers, members of the legislature, and Representatives in Congress, and other officers above provided for shall be held and the returns thereof made, canvassed, and certified as hereinbefore provided, the governor of the Territory of New Mexico shall certify the result of said election, as canvassed and certified as herein provided, to the President of the United States, who thereupon shall immediately issue his proclamation announcing the result of said election so ascertained, and upon the issuance of said proclamation by the President of the United States the proposed State of New Mexico shall be deemed admitted by Congress into the Union, by virtue of this Act, on an equal footing with the other States. * * *

Provisions corresponding to the above quoted provisions of Section 2 of the Enabling Act are found in Article XXI, Sections 1, 2, and 8 of the Constitution of New Mexico adopted January 21, 1911 (New Mexico Statutes Annotated, 1929).

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